In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1019

JOHN KENT SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–6) has not yet been reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1965. The petition for a writ of certiorari was filed on March 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge abused his discretion to regulate the scope of cross-examination as to collateral matters on two occasions during the trial.

[1] The opinion of the district court suppressing the witness Goody's post-arrest statement is reported *sub nom. United States* v. *Sims*, 231 F. Supp. 251.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the District of Maryland of aiding and abetting a bank robbery and of transporting stolen cars in interstate commerce. He was sentenced to serve a total of fifteen years imprisonment (P.A. 1).[2] The court of appeals unanimously affirmed the conviction (Pet. App. 1–6).

The evidence against petitioner consisted entirely of the testimony of four co-defendants who had pleaded guilty. It showed that petitioner participated in robbing a bank in Oxon Hill, Maryland, of over $130,000. Although not actually present during the robbery, petitioner furnished to the robbers, an organized group from New York, stolen automobiles, lodging, and other assistance (Pet. App. 2–4).[3]

The trial lasted five days. During its course, Warren Sims, the leader of the group of robbers (Pet. App. 2), testified in response to a question by the government that he had used co-defendant Andrew Chappell, but never petitioner, in other bank robberies (P.A. 5). Subsequently, Chappell testified for the government. Petitioner's counsel asked him during cross-examination about his criminal record, and

[2] "P.A." refers to petitioner's appendix and "G.A." to the government's appendix in the court below.

[3] These background facts do not appear in the record on file at the Court, which contains only those excerpts from the trial transcript that bear directly on the two evidentiary rulings challenged on appeal. Since petitioner does not challenge the sufficiency of the evidence, we have based this portion of our Statement on the summary of the facts appearing in the opinion below.

Chappell replied that it consisted of a single conviction for counterfeiting. Counsel then asked Chappell whether he had participated in other crimes with Sims. Chappell refused to answer. After being advised of his rights, Chappell claimed the privilege against self-incrimination, and the court sustained his claim (P.A. 6–10).

Another co-defendant, Harry Goody, said in the course of lengthy testimony for the government that at about 4:30 a.m. on the morning of the robbery he heard, during a conversation in a car between petitioner and co-defendant Roland Ghee, that the bank to be robbed was in Maryland (P.A. 15–16). On cross-examination, Goody said that he might have told F.B.I. agents in April, 1964, that he could not say definitely that petitioner knew the location of the bank. Goody acknowledged that he might not have told the government about petitioner's conversation in the car until about one week before the trial (P.A. 25–27, 30–33).

On recross examination, the following occurred (P.A. 35):

> Q. And you didn't tell any one of the persons who questioned you about this incident in the car?
>
> A. I refused to talk about Mr. Smith at any other time.
>
> Q. You say you did refuse to talk about Mr. Smith?
>
> MR. KERNAN. At any other time.
>
> A. At any other time.
>
> Q. Is that correct? You're positive of that?
>
> A. Yes.

Q. You didn't talk to him the first time you were arrested about Mr. Smith?

A. I believe that statement was suppressed, wasn't it, Your Honor.

Q. I can ask you about it.

The statement to which defense counsel[4] and Goody referred was a confession given on October 14, 1963, which the judge presiding at the trial had previously suppressed under the authority of *Miller* v. *United States*, 357 U.S. 301, and *Wong Sun* v. *United States*, 371 U.S. 471 (P.A. 40; G.A. 2–3; and see the opinion suppressing the statement, *United States* v. *Sims*, 231 F. Supp. 251). Goody's sole references to petitioner in this confession were that he stayed in petitioner's apartment and that petitioner was there (G.A. 2–3). Out of the hearing of the jury, petitioner's counsel explained that his purpose was to show that Goody "did in fact make a statement, which indicated that he said something about John Kent Smith, because his testimony was that prior to this, he declined to talk about Mr. Smith, in so many words" (P.A. 37). After hearing argument from defense and government counsel with regard to whether Goody could invoke the exclusionary rule against petitioner (P.A. 35–42), the court disallowed the question for the reasons (1) that the voluntariness of a confession induced by an illegal arrest is suspect, and (2) that if petitioner were allowed to cross-examine on the confession, the government would be entitled to show the illegality of the arrest and other underlying circum-

[4] At the time, counsel had the statement in his possession, having received it earlier pursuant to the Jencks Act (P.A. 19–20).

stances, which "leads us to an awful lot of collateral issues * * * which are not germane to this type of case and which become quite confusing to a jury" (P.A. 42–43).

ARGUMENT

In refusing to strike Chappell's entire testimony because of his claim of the privilege against self-incrimination and in refusing to require the witness Goody to answer whether he had referred to petitioner in a statement given after an illegal arrest, the trial judge acted well within his discretionary power to regulate the scope of cross-examination. *E.g.*, *Alford* v. *United States*, 282 U.S. 687, 694. Both questions were minor incidents relating to collateral matters in a five-day trial, during which defense counsel cross-examined each witness extensively.

1. In asking Chappell in cross-examination to testify about previous crimes of which he had not been convicted, defense counsel was asking the witness to incriminate himself.[3] Although Chappell's prior crimes related to his credibility, it was, as the court of appeals pointed out (Pet. App. 4), "obvious beyond any possibility of a doubt that Chappell's character had been placed in such a light by his own prior testimony and by that of Sims that his plea of the Fifth Amendment could have no other effect on the jury than to confirm the opinion created by his and Sims' prior testimony." Thus, the evidence sought was both cumulative (since Sims had already testified to

[3] There is no question but that Chappell's claim of privilege was valid; in fact, at the time he was under indictment in New York for a different bank robbery (Pet. App. 3).

committing other crimes with Chappell) and collateral (since prior criminal associations between Sims and Chappell had no direct bearing on their testimony linking petitioner to the crime then being tried). In addition, under established rules of evidence, there was no right to cross-examine the witness on prior criminal conduct not resulting in conviction, *e.g.*, 3 Wigmore, *Evidence*, §§ 983, 987 (3d ed. 1940); McCormick, *Evidence*, § 42 (1954). In these circumstances, the trial judge clearly had discretion to refuse to strike Chappell's entire testimony because of his valid claim of privilege. On facts almost identical to those in this case, the Court of Appeals for the Second Circuit recognized that although invocation of the privilege on cross-examination may, in appropriate circumstances, call for striking the witness's testimony on direct, invocation of the privilege did not require that a witness's testimony be stricken when the questions asked him "were purely collateral for they related solely to his credibility as a witness and had no relation to the subject matter of his direct examination." *United States* v. *Cardillo*, 316 F. 2d 606, 611, certiorari denied, 375 U.S. 822.

2. Similarly, the refusal to allow further questions about Goody's post-arrest confession was a reasonable exercise of discretion. Again, the proposed cross-examination would have related solely to Goody's credibility by showing that he lied when he said on the stand that he had not discussed petitioner with federal agents prior to one week before trial. Defense counsel, however, had already examined Goody about his references to petitioner in an April, 1964, statement made more

than one week before trial. Petitioner therefore did not need the October post-arrest confession, which contained only a fleeting mention of petitioner, to show the inconsistency. Moreover, the inconsistency was entirely collateral to the issues in the case and the proposed inquiry would have raised further collateral issues by putting in issue the question whether the post-arrest confession was voluntary or had been induced by illegal police conduct, duress, or an implied promise of heroin.[6] In these circumstances, the trial judge did not abuse his discretion in limiting the cross-examination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1965.

[6] These were the grounds on which the confession was sought to be suppressed. See *United States* v. *Sims*, 231 F. Supp. 251. Since the trial judge had presided at the suppression hearing, he was well aware that these claims might be made.

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